Supreme Court, U.S.
FILED
DEC 6 1980
MICHAEL RODAK, JR., CLERK

80-910

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CALAVO GROWERS OF CALIFORNIA,

Petitioners,

v.

GENERALI BELGIUM; COMPAGNIE D'ASSURANCES MARITIMES AERIENNES ET TERRESTRES; DEUTSCHE VERSICHERUNGS-GESELLSCHAFT IN BREMEN; BLACK SEA AND BALTIC GENERAL INSURANCE COMPANY LIMITED; ASSURANTIE VAN DE BELGISCHE BOERENBOND; GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LIMITED; GROEP JOSI; MERCATOR; DE STER (L'ETOILE); FIDELITAS; L'EUROPEENE; LA SECURITE BELGE; NAVIGA; COMPAGNIE EUROPEENE D'ASSURANCES INDUSTRIELLES (C.E.A.I.); BELGAMAR; ASSUBEL; ASSURANCES GENERALES; and LA ROYALE BELGE,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Counsel for Respondents

DANIEL G. MCDERMOTT, on the brief

December 2, 1980

Questions Presented for Review

Petitioner's statement of the "Questions Presented for Review" is replete with misstatements, unsubstantiated allegations and arguments previously rejected by both lower courts.

Respondents respectfully submit that the sole "Question Presented for Review" herein is whether the Court of Appeals erred in conditionally affirming the dismissal of petitioner's complaint on the grounds of forum non conveniens.

Respondents further submit that the opinion of the United States Court of Appeals in this case is consistent with its prior holdings and that there is no conflict among the circuits on the issue presented.

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Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondents, eighteen foreign insurers, respectfully submit this brief in opposition to the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit conditionally affirming the dismissal of petitioner's complaint by the United States District Court for the Southern District of New York on the grounds of forum non conveniens.

Opinions Below

The opinion of the United States Court of Appeals is not reported and is set forth in Petition Appendix A, at A-1, *et seq.* The opinion of the United States District Court is not reported and is set forth in Petition Appendix A, at A-23, *et seq.*

The memorandum endorsement of the United States District Court which amended the finding of facts of its opinion and held that petitioner did *not* submit affidavits that Van den Bosch, a Belgian broker, mailed the insurance policies to Effron, petitioner's agent in New York, was omitted from the Petition. Respondents set forth the memorandum endorsement in Appendix 1, infra, at 1a.

Jurisdiction

The respondents do not question the review jurisdiction of this Court.

Statement of the Case

Petitioner's "Statement of the Case" is inaccurate and misleading, and in several instances is directly contrary to the findings of the lower courts.

Petitioner states that it purchased, through Effron (its New York agent), *inter alia,* "rejection insurance" (Petition 3), however petitioner omits to apprise the Court that this insurance was purchased by Effron through its London broker, Bain Dawes (International) Limited, and its Belgian broker, Ch. Van den Bosch—J.F. DeLaet, Div. of "Assupar" N.V. (Van den Bosch). The lower courts found that the respondents never left Europe or sought business in New York and apparently did not know originally that

the shipments were destined for New York (Petition Appendix A-20; A-43).

Petitioner states that respondents mailed to petitioner, through Effron in New York, insurance certificates covering each shipment (Petition 4). The District Court specifically found that petitioner failed to make a threshold showing that respondents directly mailed the certificates or cover notes into New York and further that petitioner failed to make a prima facie showing that respondents mailed them to anyone (Petition Appendix A-33-34).

The Court of Appeals found that Van den Bosch issued a cover note which evidently was forwarded to Bain Dawes in London, which issued its own cover note directly to Effron. (Petition Appendix A-5).

Respondents refute other aspects of petitioner's "Statement of the Case" and adopt as their own Statement the facts set forth in the Court of Appeals' opinion:

> The relevant facts are as follows: Calavo, a California corporation authorized to do business in New York, is an agricultural marketing cooperative. In 1977, Calavo purchased several shipments of Turkish figs through its purchasing agent Effron Brokerage Corp., a New York corporation. Effron also arranged insurance for the fig shipments by contacting Bain Dawes (Int'l) Ltd. (Bain Dawes), a broker for Lloyd's of London located in London. Effron instructed Bain Dawes to acquire both standard marine insurance and "rejection" insurance for the figs; the latter type of insurance protects against the risk of rejection or condemnation of the insured goods by the government of the country of import for failure to meet local health standards.
>
> In order to arrange the insurance, Bain Dawes apparently contacted Ch. Van den Bosch-J.F. de Laet

(Van den Bosch), a Belgian insurance broker. Van den Bosch in turn contacted defendant underwriters all of whom were organized, and have their principal place of business, in Europe. [footnote omitted]. Only two of the underwriters are authorized to do business in New York. By a cover note issued on a Van den Bosch form, the underwriters bound themselves to a policy of marine and rejection insurance naming Effron as the insured. This cover note evidently was forwarded to Bain Dawes in London, which then issued another cover note directly to Effron. As the various shipments were made, Effron would notify Bain Dawes; individual insurance certificates naming Calavo as the insured would then be issued on Van den Bosch forms that were signed by an agent for all the underwriters. The certificates, as well as the bills for premiums due upon them, were mailed to Effron in New York.

Eight of the thirteen shipments of figs sent from Turkey to New York were rejected in whole or in part by the United States Food and Drug Administration (FDA) on the ground that they were infested by insects. Upon receiving notice of the rejections and in compliance with the instructions given in the insurance certificates, Effron contacted Toplis & Harding, (T&H) a maritime surveyor located in New York. After instructing Effron to warehouse the shipments, T&H surveyed them and prepared reports that apparently were sent to the underwriters; it then solicited bids for the resale of the figs, and recommended to Effron that the highest bid be accepted, which recommendation Effron followed.

Effron submitted formal insurance claims to the underwriters through T&H. The underwriters refused to pay these claims, however, allegedly on the ground that the insurance policies required Calavo to prove

affirmatively that the contamination of the figs had occurred during, rather than before, the shipments. Thereafter, the underwriters commenced an action in the Commercial Court of Antwerp for a declaratory judgment that they were not liable on the policies. Approximately two weeks later, Calavo instituted the present action, alleging that the underwriters had breached the contract of insurance and had fraudulently failed to disclose their interpretation of the insurance policy. (Petition Appendix A-4-7).

The Court of Appeals held that the District Court had applied the proper tests as set forth by this Court in *Gulf Oil* v. *Gilbert,* 330 U.S. 50 (1947); had carefully considered both the public and private interests at stake; and had not abused its discretion by dismissing the action on the grounds of forum non conveniens. The Court of Appeals held, however, that the dismissal should have been conditional only.

It thereupon remanded the case for a determination of whether the respondents would consent to a conditional dismissal. The respondents have submitted Stipulations to the District Court which respondents believe conform to the Court of Appeals' requirements. (Appendices 2 at 2a and 3 at 3a).

The District Court has not rendered its decision on the remand as of this date.

Argument Opposing the Writ

The respondents are a group of eighteen European insurers which insured various shipments of figs moving from Turkey to the United States. No particular United States destination was provided for in the policies. Portions of the shipment were rejected by the United States Food and

Drug Administration and claims were made by the petitioner against the respondents who declined payment under the terms and conditions of the policies. When it became apparent that the matter could not be resolved amicably, the respondents commenced an action in the Commercial Court of Antwerp for judgment determining whether they were liable under the policies. The petitioner herein as well as other parties who had or might have an interest in that action (*e.g.*, the shipper and ultimate consignee) were served by mail with a Writ of Summons on February 22, 1979. The Writ was served pursuant to the terms of the Convention for Service Abroad of Judicial and Extrajudicial Documents to which both Belgium and the United States are signatories.

Two weeks thereafter, petitioner commenced this action against the respondents seeking to recover damages alleging defendants "fraud in connection with the issuance of, and breach of, an insurance contract and the policies thereunder". (Complaint—para. 1—not reproduced in Appendix).

This insurance contract was negotiated, issued and allegedly breached in Belgium (Petition Appendix A-10-11; A-18-19, n.3).

The respondents all have their principal place of business in Europe and sixteen of the eighteen insurers are not authorized to do business in the State of New York (Petition Appendix A-8).

The respondents moved to dismiss the New York action on the grounds that the District Court lacked in personam jurisdiction over the sixteen unauthorized insurers, and alternatively on the ground that New York was an inconvenient forum for all respondents. The District Court

found jurisdiction over the respondents, however, it dismissed the action on the grounds of forum non conveniens.

Both parties appealed therefrom and the Court of Appeals conditionally affirmed the District Court's findings as to a dismissal remanding the case for a determination of whether the defendants would consent to a conditional dismissal. The Court of Appeals deferred a decision on respondents' cross-appeal on the issue of jurisdiction in light of its holding as hereinbefore set forth (Petition Appendix A-14-17).

This Court set forth the standards to be applied by a court which is presented with an application to dismiss an action pursuant to the doctrine of forum non conveniens in *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 508, 509 (1947):

> * * * An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; * * * and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
>
> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for

> courts when litigation is piled up in congested centers instead of being handled at its origin. * * * There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

These standards, as valid today as the day they were conceived, were properly adhered to by the Court of Appeals and its holding herein is consistent with *Gulf Oil, supra,* and the recent holdings of the Second Circuit. See *Farmanfarmaian* v. *Gulf Oil Corp.,* 588 F. 2d 880 (2d Cir. 1978) and *Alcoa Steamship Company, Inc.* v. *M/V Nordic Regent,* No. 78-7054, slip op. at 5945, 5954, 5955 (2d Cir. Feb. 25, 1980) (en banc), cert. denied, —— U.S. ——, 66 L. Ed. 2d 116 (1980).

A determination of a motion for dismissal on the grounds of forum non conveniens is within the sound discretion of the trial court, which is to be guided by the above mentioned criteria. An appellate court should only disturb the lower court's decision if it be found that such court clearly abused its discretion. *Gulf Oil, supra* at 508; *Farmanfarmaian, supra* at 882; *Fitzgerald* v. *Texaco, Inc.,* 521 F.2d 448 (2d Cir. 1975), cert. denied, 423 U.S. 1052 (1976).

The Court of Appeals in this case specifically found:

> In determining whether New York was a convenient forum, the district court properly took into account the factors set forth in Gulf Oil, supra, 330 U.S. at 508-09. The court considered first the "private interest" of the litigants, including the "relative ease of access to

> sources of proof," the "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses," and "all other practical problems that make trial of a case easy, expeditious and inexpensive." Id. at 508. These factors, in the court's view, all pointed to the conclusion that New York was an inconvenient forum. The focal point of this litigation is not New York, where the rejection of the figs took place, but rather Europe, where the contract of insurance was negotiated and where payment under the contract was refused. As the district court noted, Calavo did not contest in the court below either the findings of infestation made by the FDA or the assessment of damages made by T&H; instead, the gravamen of the complaint was breach of contract and fraud. [footnote omitted]. These allegations will necessitate an inquiry into the circumstances surrounding the formation of the contract and the intentions of the parties who negotiated it, almost all of whom are located in Europe. The underwriters all are organized and have their principal places of business in Europe; sixteen of them do no business in New York. Moreover, neither Bain Dawes, the London broker who apparently acted as Calavo's agent, nor Van den Bosch, the Belgian broker who negotiated the insurance contract, is subject to the court's compulsory process, although representatives of both may be key witnesses. Finally, the documents surrounding the negotiation are apparently located in Belgium. (Petition Appendix A-10-11).

Furthermore, the Court of Appeals found that the District Court

> also looked to the "[f]actors of public interests" that Gulf Oil held to be relevant to the application of the

> doctrine of forum non conveniens. 330 U.S. at 508-09. The lower court found that Belgium was apparently the jurisdiction most intimately concerned with the issues raised in this litigation. [footnote omitted]. The suit involves its residents; more importantly, it involves a contract negotiated and allegedly breached in Belgium, and may require an inquiry into the customs of the insurance industry in Belgium and Europe at large. [footnote omitted]. This connection with the law suit militates, the lower court found, in favor of the application of Belgian law, see Babcock v. Jackson, 12 N.Y. 2d 473, 481-82 (1963); the likelihood that Belgian law would govern in turn lends weight to the conclusion that the suit should be prosecuted in that jurisdiction. See Schertenleib v. Traum, 589 F.2d 1156, 1165 (2d Cir. 1978); cf. Gulf Oil, supra, 330 U.S. at 509. Finally, the lower court noted that judicial efficiency will be served by trying this case in Belgium, where the underwriters' action is already in progress; by dismissing this suit, the court pointed out, needless duplication of proof and waste of judicial resources will be avoided. Cf. Gulf Oil, supra, 330 U.S. at 508. (Petition Appendix A-12-13).

Finally, the Court of Appeals held that the doctrine of forum non conveniens presupposes that an alternative forum is available; that the existence of an alternative forum was uncontested in this case, and that the District Court assumed that because respondents had invoked the jurisdiction of the Belgian Court, they would be subject to its jurisdiction in an action brought by petitioner against them there. The Court of Appeals indicated though that the better approach would have been to make the dismissal conditional upon the willingness of the Belgian courts to hear this case and upon the consent of all respondents to

submit to jurisdiction in Belgium; to waive any statute of limitations defense that may have arisen since commencement of this action; and to pay any judgment that might be rendered against them (Petition Appendix A-14-15). These conditions are consistent with the spirit of *Gulf Oil, supra,* and the holdings in *Alcoa Steamship, supra,* slip op. at 5971 n.16; *Schertenleib, supra* at 1166; *Farmanfarmaian, supra* at 881; *Fitzgerald, supra* at 449.

Respondents have agreed to the conditions set forth by the Court of Appeals. (Appendix 2-3a-4a).

An additional factor, brought to the lower courts' attention, but not expressly mentioned in either opinion, is that the sixteen foreign insurers who are not authorized to do business in New York will have to post security in an amount sufficient to secure the payment of any final judgment which may be rendered against them as a condition precedent to filing an answer to the complaint. New York Insurance Law § 59-a(3)(a).

Petitioner has claimed $999,649.79 in damages and an additional $1,000,000.00 in punitive damages. The premiums to secure a bond in such a case would be substantial since an unauthorized foreign insurer cannot post its own undertaking. Accordingly, the action brought in New York is oppressive and unnecessarily vexatious since there is a prior Belgian action pending concerning the same issues. *Gulf Oil, supra,* at 508.

One need only look to petitioner's complaint in this action to find justification for having this matter heard before the the forum having the most interest in resolving the issues.

The gravamen of the petitioner's complaint is for damages for an alleged breach of contract and an alleged fraud concerning the "validity of the construction placed upon the insurance contract by respondents" (Petition p. 12).

These allegations will necessitate an inquiry into the circumstances surrounding the formation of the contract, the intentions of the parties who negotiated it, and the reasons why payment of the claims were refused. These activities all took place in Belgium. (Petition Appendix A-10-11.)

The lower courts properly found that the focal point of this litigation is not New York where the rejection of the figs took place since the facts surrounding these matters are uncontested (Petition Appendix A-11). They correctly concluded that it was Belgium where the contract of insurance was negotiated, issued and where, according to petitioner, respondents conspired to defraud it and breach the contract.

CONCLUSION

It is respectfully requested that the Petition for a Writ of Certiorari be denied.

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(212) 964-3553
Counsel for Respondents

Daniel G. McDermott, on the brief

APPENDIX 1

Memorandum Endorsement of the District Court

Index No. Year 19

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CALAVO GROWERS OF CALIFORNIA,

Plaintiff,

—against—

GENERALI BELGIUM, *et al.*,

Defendants.

NOTICE OF MOTION TO AMEND THE FINDINGS AND JUDGMENT OF THE COURT WITH AFFIDAVIT

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Appendix 1

The findings are hereby amended to reflect that plaintiff did not submit affidavits stating that Van den Bosch mailed the policies to Effron. In all other respects, defendant's motion is denied.

So ordered.

December 20, 1979.

/s/ Sweet
U.S.D.J.

U. S. District Court
S. D. of N. Y.
Filed
Dec 26 1979

Copy Received

By Hand ☒

Date 12/5/79 Time 4:45 PM

Coudert Brothers

Attorneys for Pltff.

By A.J.

APPENDIX 2

Stipulation of Insurers Agreeing to Conditions Set Forth by Court of Appeals

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

79 Civ. 1219 (RWS)

CALAVO GROWERS OF CALIFORNIA,

Plaintiff,

—against—

GENERALI BELGIUM; COMPAGNIE D'ASSURANCES MARITIMES AERIENNES ET TERRESTRES; DEUTSCHE VERSICHERUNGS-GESELLSCHAFT IN BREMEN; BLACK SEA AND BALTIC GENERAL INSURANCE COMPANY LIMITED; ASSURANTIE VAN DE BELGISCHE BOERENBOND; GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LIMITED; GROEP JOSI; MERCATOR; DE STER (L'ETOILE); FIDELITAS; L'EUROPEENE; LA SECURITE BELGE; NAVIGA; COMPAGNIE EUROPEENE D'ASSURANCES INDUSTRIELLES (C.E.A.I.); BELGAMAR; ASSUBEL; ASSURANCES GENERALES; and LA ROYALE BELGE,

Defendants.

WHEREAS, the United States Court of Appeals for the Second Circuit requires that as conditions to a conditional dismissal of this case on grounds for forum non conveniens, the defendants, *inter alia*, agree to:

1. Submit to the jurisdiction of a Belgian Court to hear any action brought by Calavo Growers of California against defendants;

2. Waive any defense available to the defendants on the grounds of any statute of limitation defense that may have arisen since the commencement of this action in the United

Appendix 2

States District Court for the Southern District of New York, and

3. Agree to pay any final judgment that might be rendered against the defendants in a Belgian Court.

Now Therefore, each defendant individually for itself only and to the extent that it participated as an insurer in the shipments which are the subject of this action, hereby agrees as follows:

1. Each defendant will submit to the jurisdiction of a Belgian Court to hear any action brought by Calavo Growers of California against it concerning the cargo which is the subject of this action;

2. Each defendant waives any defense available to it on the grounds of any statute of limitation defense that may have arisen since the commencement of this action in the United States District Court for the Southern District of New York, and

3. Each defendant agrees to pay any final judgment that might be rendered against it on account of any such action brought in a Belgian Court.

Dated: New York, New York
November 13, 1980.

Donovan, Maloof, Walsh & Kennedy

By: /s/ Donald M. Kennedy
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APPENDIX 3

Stipulation of Insurers Agreeing to Conditional Dismissal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

79 Civ. 1219 (RWS)

CALAVO GROWERS OF CALIFORNIA,

Plaintiff,

—against—

GENERALI BELGIUM; COMPAGNIE D'ASSURANCES MARITIMES AERIENNES ET TERRESTRES; DEUTSCHE VERSICHERUNGS-GESELLSCHAFT IN BREMEN; BLACK SEA AND BALTIC GENERAL INSURANCE COMPANY LIMITED; ASSURANTIE VAN DE BELGISCHE BOERENBOND; GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LIMITED; GROEP JOSI; MERCATOR; DE STER (L'ETOILE); FIDELITAS; L'EUROPEENE; LA SECURITE BELGE; NAVIGA; COMPAGNIE EUROPEENE D'ASSURANCES INDUSTRIELLES (C.E.A.I.); BELGAMAR; ASSUBEL; ASSURANCES GENERALES; and LA ROYALE BELGE,

Defendants.

The defendants herein by their attorneys, Donovan, Maloof, Walsh & Kennedy, hereby agree to a conditional dismissal of this action said condition being "the willing-

ness of the Belgian Court to hear this case" in a court of competent jurisdiction.

Dated: New York, New York
November 13, 1980.

DONOVAN, MALOOF, WALSH & KENNEDY

By: /s/ DONALD M. KENNEDY
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